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Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of SBC Communications Inc	)	WC Docket No. 04-29
For Forbearance from the Application of	)	
Title II Common Carrier Regulation to	)	
IP Platform Services	)	

PETITION OF SBC COMMUNICATIONS INC. FOR FORBEARANCE

Pursuant to 47 C.F.R. § 1.53 and 47 U.S.C. § 160(c), SBC Communications Inc. ("SBC") hereby petitions the Commission to forbear from applying Title II common carrier regulation to IP platform services. SBC has today petitioned the Commission to declare that IP platform services, as defined in that petition: (1) are interstate communications subject to the Commission's exclusive jurisdiction under Title I of the Communications Act; (2) do not fit any of the service-specific legacy regulatory regimes in Titles II, III, or VI of the Communications Act, notwithstanding that particular applications riding on top of the IP platform may have attributes of traditional services regulated under those Titles, and (3) are not subject to the *Computer II* requirements.[1] The background discussion in that petition, including the definition of IP platform services, is equally applicable to the instant request for forbearance, and SBC incorporates that discussion by reference. A copy of that petition is attached for reference.

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[1] Petition of SBC Communications Inc. for a Declaratory Ruling Regarding IP Platform Services (filed Feb. 5, 2004).

DISCUSSION

The Commission should eliminate any doubt concerning the unregulated status of IP platform services by expressly forbearing from applying Title II regulation to these services to the extent that such regulation might otherwise be found to apply. By doing so, the Commission will ensure that IP platform services will be permitted to thrive in accordance with the mandates of the Act and established Commission policies.[2] Forbearance will not prevent the Commission from fashioning under Title I whatever regulations it reasonably finds to be needed to achieve important public policy objectives such as universal service, public safety/E911, communications assistance for law enforcement, and disability access. Nor will it threaten competitive access to the legacy facilities that are regulated under Title II today.

I. FORBEARANCE FROM TITLE II REGULATION, IN CONJUNCTION WITH A DECLARATORY RULING REGARDING IP PLATFORM SERVICES, IS NECESSARY TO PROVIDE REGULATORY CERTAINTY.

Forbearance, in conjunction with a declaratory ruling, will provide regulatory certainty on a national basis and promote investment in, and the development of, IP platform services.

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[2] *See, e.g.*, 47 U.S.C. § 230(b)(2) (declaring that it "is the policy of the United States" to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation"); 47 U.S.C. § 157(a) notes (directing the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans," using "regulatory forbearance" and "other regulating methods that remove barriers to infrastructure investment"), Preamble to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (stating that it is the purpose of the Telecommunications Act of 1996 to "reduce regulation in order to . . . encourage the rapid deployment of new telecommunications technologies"); Notice of Proposed Rulemaking, *Local Competition and Broadband Reporting*, 14 FCC Rcd 18100, 18130 ¶ 61 (1999) ("The Commission does not regulate internet services[.]"); Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11540 ¶ 82 (1998) ("We recognize the unique qualities of the Internet, and do not presume that legacy regulatory frameworks are appropriately applied to it.").

The Commission followed a similar two-step approach with respect to cable modem service. After concluding that cable modem service is an "information service" that is not subject to common carrier regulation under Title II, the Commission proceeded on its own motion to forbear from the application of *Computer II* requirements and tentatively concluded that forbearance from applying *any* Title II regulation was appropriate.[3] The Commission did so specifically in light of adverse court precedent that could potentially threaten its substantive conclusion concerning the regulatory classification of cable modem service but that preserved the possibility of forbearance.[4] As the Commission explained:

> Given that cable modem service will be treated as an information service in most of the country, we tentatively conclude that the public interest would be served by the uniform national policy that would result from the exercise of forbearance to the extent cable modem service is classified as a telecommunications service. We also believe that forbearance would be in the public interest because cable modem service is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing.[5]

This rationale applies with even greater force here, given the uncertainty that is being created by the courts and state regulators about the regulatory status of IP platform services. In particular, the Ninth Circuit's decision in *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), which holds that cable modem service contains a Title II "telecommunications service," has disturbed the industry's previous understanding that IP platform services are

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[3] *See* Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798, 4825-26 ¶ 45, 4847 ¶ 94 (2002) ("*Cable Modem Order*"), *rev'd on other grounds sub nom. Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

[4] *See id.* at 4847 ¶ 94.

[5] *Id.* at 4847-48 ¶ 95.

immune from legacy regulation under current law Significantly, however, the Ninth Circuit left intact the Commission's tentative decision in the *Cable Modem Order* to forbear from the application of Title II regulation to cable modem service [6] Forbearance thus is not only appropriate but prudent to ensure that any uncertainties about regulatory classification do not undermine the Commission's national policy of deregulation. The Commission should dispel the legal uncertainty created by *Brand X* (and other decisions and regulatory proceedings) and restore a stable deregulatory environment for IP platform services as a whole by exercising its considerable discretion under Section 10 to forbear from applying any Title II or other legacy regulation that might otherwise be found to apply to them

II. SECTION 10 OF THE COMMUNICATIONS ACT REQUIRES THE COMMISSION TO FORBEAR FROM APPLYING TITLE II REGULATION TO IP PLATFORM SERVICES.

Section 10 of the Communications Act requires the Commission to forbear from applying regulations that are (1) "not necessary to ensure that . charges, practices, classifications, or regulations . are just and reasonable and *are not unjustly or unreasonably discriminatory*," (2) "not necessary for the protection of consumers," and (3) not consistent with "the public interest "[7] Each of these criteria applies to require forbearance from Title II common carrier regulation of IP platform services.

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6 *See Brand X*, 345 F.3d at 1132 n.14.

7 47 U S C. § 160(a).

A. Title II Regulation of IP Platform Services Is Not Consistent with the Public Interest.

First, and above all else, Title II regulation of IP platform services is decidedly inconsistent with — and in fact, affirmatively harmful to — the public interest. For the reasons described in SBC's petition for a declaratory ruling, Title II constraints are both unnecessary to ensure the fairness of the terms under which IP platform services are offered and harmful to the continued development of the Internet. Because no single entity or class of entities dominates the provision of IP platform services, and because multiple vendors specialize in providing facilities, software, or services, the market for IP platform services operates well without regulation. This widespread competitive parity will be sustained going forward by the nature of the Internet itself, whose open-standards-based architecture lowers barriers to entry. Title II regulation would distort the workings of these market forces by imposing new costs on some participants but not others, interfering with the cooperative business relationships of the various market participants, and discouraging some types of new entrants from taking advantage of the openness of IP platforms to enter or offer new and diverse services.

The Commission has long recognized that "the advent and growth of competition in a particular market eliminates the need for continued regulation."[8] Indeed, the Commission has acknowledged that imposing regulation in a competitive market can be affirmatively harmful: "Regulation often can distort the workings of the market by imposing costs on market

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[8] Report and Order, *Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry)*, 95 F.C.C.2d 1276, 1301 ¶ 38 (1983)

participants which they otherwise would not have to bear."[9] The Commission has expressed a longstanding preference for "using a market-based approach," reasoning that, where competition has developed and markets are open, this "should minimize the potential that regulation will create and maintain distortions in the investment decisions of competitors as they enter local telecommunications markets."[10]

That is clearly the appropriate approach here. Title II regulation of IP platform services would impede the innovation and investment that are essential to the Internet's continued growth. As the Commission has repeatedly noted, it can "'encourage investment and innovation by reducing regulatory obligations;'"[11] to regulate where regulation is *unnecessary* has the exact opposite effect, as does even the threat of unnecessary regulation. Forcing some or all IP platform services into Title II (or leaving open the possibility that this is imminent) would likely lead providers to tailor their services to avoid or accommodate regulatory requirements instead of to meet customer needs and utilize the capabilities of emerging technologies. Providers would have an incentive to develop products that most closely resemble traditional information services while deliberately excluding from their offerings any features or applications that could arguably be categorized as telecommunications services subject to Title II regulation. As a result,

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9 *Id.*

10 First Report and Order, *Access Charge Reform*, 12 FCC Rcd 15982, 16094 ¶ 263 (1997) ("*Access Charge Reform Order*")

11 Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 16999-17000 ¶ 22 (2003) ("*Triennial Review Order*") (quoting Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3705 (1999)).

regulation would drive the design of these services, preventing the realization of the full potential of IP platforms as vehicles of communications. This result would be contrary to the Commission's undeniable public interest obligation to continue to take notice of IP-based technology and promote the development and use of IP technology to support advanced services.[12]

In addition to deterring investment and innovation, Title II regulation of IP platform services would become almost instantaneously outdated, in light of the rapid pace of technological change that has characterized the Internet's development thus far. Title II regulation is too rigid to keep pace with the evolution of IP technology. IP platforms enable myriad permutations of services and applications that blur regulatory boundaries by mimicking traits of telecommunications services and services governed by the Act's other substantive Titles. Any attempt to regulate IP platform services would reflect nothing more than a snapshot of one moment in the evolution of these services. Therefore, applying Title II regulation in any meaningful, consistent fashion would involve a game of constant catch-up, in which regulation would always lag behind the market by a considerable degree. Because Title II is inherently incapable of fairly or practicably regulating IP platform services, such regulation can hardly be said to be "necessary." Indeed, the Commission's prior determinations — sometimes implicit — that Title II regulation should *not* apply to many IP platform services, networks, and service providers, are themselves evidence that such regulation cannot be characterized as "necessary."

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[12] *See, e.g.*, 47 U.S.C. § 157(a) notes (directing the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans," using "regulatory forbearance" and "other regulating methods that remove barriers to infrastructure investment").

Forbearance is appropriate with respect to *all* IP platform services. Title II regulation of some but not all IP platform services would be inherently impractical. In light of the variety and multiplicity of participants in the Internet marketplace, there is no principled place to start — or for that matter, to stop — regulation. In contrast to the circuit-switched network, which has a more clearly delineated hierarchy of carriers that operate the underlying facilities and carriers that seek their use, the Internet environment is not readily stratified. Once regulation of an IP platform service commenced, there would be no basis for declining to extend similar treatment to every similar service provided by any other type of entity. Regulation of selected IP platform services would also confront the fact that all such services generally ride the same IP platforms. For example, the IP routers and facilities used to provide customized IP-based virtual private networks ("IP-VPNs") frequently are the same routers and facilities used to provide the "best efforts" services provided over the public Internet.

Thus, it would be increasingly difficult to regulate discrete services or applications without affecting other IP platform capabilities. Selecting some IP platform services for regulation would tend to lead to regulation of the Internet as a whole. This risk would aggravate, rather than alleviate, the regulatory uncertainty that exists today in this area, as no provider of IP platform services would be able to predict the ways in which Title II regulation might apply to its products. And as the Commission has recognized, "a stable and predictable federal regulatory environment . . . is conducive to continued investment . . . [and] minimiz[es] regulatory uncertainty and any consequent chilling of investment activity."[13]

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[13] Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1421 ¶ 25

A Commission determination that IP platform services must remain unregulated will have no effect on rights of access to legacy, non-IP-based services and certain of the facilities that support them. First, no matter what services an ILEC might provide over given facilities in its network, a CLEC would still be entitled to lease those underlying network elements that meet the standards of section 251(d)(2), as such standards are evaluated from time to time by the Commission. Thus, to the extent the Commission retains unbundling obligations for xDSL-capable loops, as an example, that obligation would survive a determination that IP platform services offered over that loop are unregulated. Furthermore, ILECs would remain subject to the *Computer II* obligations in offering non-IP-based information services, thus ensuring unbundled access to the basic serving elements of these legacy services.[14] For instance, ILECs would retain their existing obligations to provide ISPs with access to legacy, non-IP-enabled frame relay and ATM services on a common carriage basis. Likewise, ISP access rights to today's common carrier DSL transport services would be untouched by a Commission declaration that IP platform services are unregulated. Today, DSL transport is an ATM-based transmission service; the only DSL transport that would receive unregulated treatment is a DSL transport functionality that

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(1994); *see also Cable Modem Order* at 4802 ¶ 5 ("[W]e seek to remove regulatory uncertainty that in itself may discourage investment and innovation."); Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019, 3022-23 ¶ 5 (2002) (the Commission's "policy and regulatory framework will work to foster investment and innovation in these networks by limiting regulatory uncertainty and unnecessary or unduly burdensome regulatory costs"); *Triennial Review Order*, Separate Statement of Chairman Michael K. Powell at 17519 (the absence of "clear and sustainable rules" may result in "a molten morass of regulatory activity that may very well wilt any . . investment interest . . . .").

[14] As permitted by the *Computer II* framework, of course, carriers may seek and obtain relief from such obligations where appropriate. In any event, such relief pertaining to legacy services would not be a function of the relief requested in this petition.

meets the standard articulated herein — that is, it allows the customer to send or receive communications in IP format. On the other hand, Internet backbones, which already provide backbone customers with the ability to send and receive communications in IP format, would continue to be free of any such unbundling requirements, as they are today. Concerns about barriers to entry and bottleneck facilities on the circuit-switched network thus are not implicated by this petition, which seeks forbearance solely with respect to the IP platforms that overlay those facilities and the related services.

B. Title II Regulation of IP Platform Services is Not Necessary to Protect Consumers.

Title II regulation of IP platform services also is not necessary to protect consumers. As the Commission has recognized

> Competitive markets are superior mechanisms for protecting consumers by ensuring that goods and services are provided to consumers in the most efficient manner possible and at prices that reflect the cost of production. Accordingly, where competition develops, it should be relied upon as much as possible to protect consumers and the public interest.[15]

The history of IP platform services perfectly illustrates this general rule. As explained in SBC's companion petition for a declaratory ruling, consumers already have benefited tremendously from the hands-off policy that has made the Internet's exponential growth possible. Therefore, regulation would not only fail to afford consumers any additional protections, but it would in fact harm them by providing disincentives to continued innovation and thus limit the range of IP platform services that are available

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[15] *Access Charge Reform Order* at 16094 ¶ 263.

Furthermore, forbearance from applying Title II economic regulation to IP platform services will not preclude the formulation and application of regulations designed to protect public safety and consumer interests. As explained in SBC's petition for a declaratory ruling, to the extent the public interest requires the application of individual regulatory requirements to IP platform services to address public safety or other such concerns, the Commission has the authority to act under Title I and to tailor the requirements specifically to the context of IP platform services.

C. Title II Regulation of IP Platform Services Is Not Necessary to Ensure That Charges and Practices in Connection with Such Services Are Just and Reasonable and Not Unjustly or Unreasonably Discriminatory.

Finally, Title II regulation is not necessary to ensure that IP platform services will be offered in a just, reasonable, and nondiscriminatory manner. As noted above and explained more fully in SBC's petition for a declaratory ruling, the market for IP platform services is already highly competitive and operates pursuant to cooperative business arrangements. Thus, market forces will continue to ensure that rates will be kept at reasonable levels and that providers' practices — with respect to consumers and to each other — will remain reasonable and nondiscriminatory. As a result, Title II regulation of IP platform services will be unnecessary.

Any doubt about the appropriateness of forbearance in this context should be resolved by section 706 of the 1996 Act, which directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability" through "regulatory forbearance" and "other regulating methods that remove barriers to infrastructure investment."[16] Although the Commission has not viewed section 706 as an *independent* source of forbearance

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[16] 47 U.S.C. § 157(a) notes.

authority, it has emphasized that the mandate of section 706 to promote broadband investment through "regulatory forbearance" weighs heavily in favor of forbearing under section 10 from unnecessary regulation of advanced services. "[S]ection 706(a) directs the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced services."[17] The Commission should do so here.

CONCLUSION

For these reasons and the reasons stated in SBC's accompanying petition for declaratory ruling, the Commission should forbear from applying Title II common carrier regulation to IP platform services.

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February 5, 2004

[17] Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24044-45 ¶ 69 (1998).

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Petition of SBC Communications Inc.	)	WC Docket No. 04-___
For a Declaratory Ruling Regarding	)	
IP Platform Services	)	

PETITION OF SBC COMMUNICATIONS INC. FOR A DECLARATORY RULING

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SUMMARY

Congress directed the Commission to ensure that the Internet be kept "unfettered by Federal or State regulation,"[1] and to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" through the removal of regulation.[2] With this petition, SBC asks the Commission to implement that directive with respect to the numerous innovative services based on the Internet Protocol ("IP") that are rapidly proliferating in the communications market today. Specifically, SBC seeks confirmation that IP platform services — defined as those services that enable any customer to send or receive communications in IP format over an IP platform — are not subject to Title II regulation.

Title II regulation of IP platform services would be both unnecessary and harmful. In contrast to the public switched telephone network ("PSTN,") the IP platform is an overlay network characterized by low barriers to entry, making this market highly competitive without any need for governmental intervention. Regulation of these services would discourage innovation and investment, and would be unable to keep pace with the rapidly developing technology of the Internet. In fact, investment and innovation in IP platform services are already being threatened by regulatory uncertainty that has arisen as state commissions and courts begin to regulate IP platform services in the absence of definitive action by the Commission precluding them from doing so.

In order to create a stable deregulatory framework for IP platform services, the Commission should declare that such services are categorically interstate communications that

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1 47 U.S.C. § 230(b)(2).

2 *Id.* § 157(a) notes.

are subject to the Commission's exclusive jurisdiction under Title I of the Communications Act. By virtue of the internationally dispersed nature of the Internet itself, IP platform services are inherently interstate for the same reasons cited by the Commission with respect to the Internet. To the extent the Commission finds a need to regulate IP platform services, it may use its Title I authority to tailor specific regulatory requirements regarding such issues as E911 compliance, communications assistance to law enforcement, universal service, and access for disabled persons.

The Commission should also declare that IP platform services are not subject to the Title II regime applicable to telecommunications carriers. Because IP platform services intrinsically offer the capability for manipulating information, they are correctly viewed as "information services," which the Commission has recognized are properly treated under Title I. In addition, IP platform services can be classified as "private carriage" offerings, since they are provided through individually tailored commercial arrangements.

In addition, the Commission should declare that the *Computer II* unbundling requirements do not apply to IP platform services. Requiring providers of IP platform services to isolate a transmission component of each offering and provide it as a telecommunications service would, like the imposition of Title II regulation generally, constrain the innovation and investment that are essential to the continued development of these technologies.

A Commission declaration limiting the scope of Title II regulation as requested herein would in no way affect existing regulation of legacy services and facilities by either state or federal regulators, or predetermine the outcome of pending proceedings relating to legacy broadband services. No matter what services an ILEC might provide over facilities in its network, a CLEC would still be entitled to lease those underlying network elements that meet the

standards of section 251(d)(2), as such standards are evaluated from time to time by the Commission. Furthermore, ILECs would remain subject to the *Computer II* obligations in offering non-IP-based information services, thus ensuring unbundled access to the basic serving elements of these legacy services.

In sum, by declaring that IP platform services are not subject to Title II regulation, the Commission would preclude the encroachment of common carrier regulation into the IP sphere, maintain the status quo for IP platform services, and accommodate with regulatory certainty the evolution of IP network technology, services, and applications.

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For a Declaratory Ruling Regarding	)	
IP Platform Services	)	

PETITION OF SBC COMMUNICATIONS INC. FOR A DECLARATORY RULING

Pursuant to 47 C.F.R. § 1.2, SBC Communications Inc. ("SBC") hereby petitions the Commission to reaffirm that its longstanding practice of regulatory restraint with respect to the Internet will continue to apply to the inextricably linked services and network functionalities that rely on the Internet Protocol ("IP") platform, referred to herein as "IP platform services."[3] The Commission wisely has shown no signs of departing from its established approach in this context, which is mandated by Congress's directive to keep the Internet, which is simply a vast collection of interconnected IP platforms, "unfettered by Federal or State regulation."[4] But other regulatory bodies *have* begun to take divergent actions in the absence of a definitive Commission statement precluding them from doing so. Given the resulting legal uncertainty, the Commission should now formalize its nonregulatory policy to ensure that the Internet remains insulated from unnecessary and harmful economic regulation at both the federal and state levels. Myriad

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[3] As discussed more fully below, "IP platform services" consist of (a) IP networks and their associated capabilities and functionalities (*i.e.*, an IP platform), and (b) IP services and applications provided over an IP platform that enable an end user to send or receive a communication in IP format.

[4] 47 U.S.C. § 230(b)(2).

entities of all kinds are today providing or poised to provide IP platform services of diverse types. Prompt Commission action is therefore critical to provide regulatory certainty and stability and to ensure that the Internet success story will continue.

Such action should include three steps. *First*, the Commission should confirm that IP platform services are indivisibly interstate communications and therefore fall within the Commission's exclusive regulatory jurisdiction under Title I of the Communications Act. To the extent the Commission finds it appropriate from time to time to impose particular regulatory obligations on such services, it may do so pursuant to its Title I authority. *Second*, the Commission should rule definitively that IP platform services do not fit any of the service-specific legacy regulatory regimes in Titles II, III, or VI of the Communications Act, notwithstanding that particular applications riding on top of the IP platform may have attributes of traditional services regulated under those Titles.[5] *Third*, the Commission should declare that the *Computer II* unbundling requirements do not apply to IP platform services or IP platforms.

Fencing IP platform services off from economic regulations traditionally applied to legacy telecommunications services would not put them beyond the reach of regulation necessary to promote important public policy goals (such as universal service, public safety/E-911, communications assistance for law enforcement, and disability access), nor would it threaten competitive access to the legacy facilities underlying these services. But it would mean that future regulatory decisions would start from the premise that IP platform services are

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[5] To remove any doubt about the inapplicability of Title II or the other service-specific Titles of the Act to IP platform services, the Commission should forbear from applying any such provisions that might otherwise be found to apply. SBC is filing its forbearance request in a separate petition. That petition incorporates the arguments presented herein by reference, in light of the close relationship between SBC's requests for a declaratory ruling and for forbearance.

unregulated. Neither regulators nor courts would address these services from a presumption that legacy economic regulations under Titles II, III, or VI apply unless removed on a piecemeal basis. Rather, the Commission could craft and apply any necessary and appropriate regulatory requirements under Title I. Only by establishing this "bottom up" approach can the Commission remain true to its properly lauded tradition of fostering the growth of the Internet through a policy of prudent "unregulation."[6]

BACKGROUND

In enacting the Telecommunications Act of 1996, Congress made unequivocally clear that the Internet should remain unregulated. As Congress found, "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation."[7] Accordingly, Congress declared that it "is the policy of the United States" to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*."[8] Congress viewed the elimination of unnecessary and harmful regulation as essential to promoting the Internet's continued growth; its very purpose in passing the Telecommunications Act of 1996 was to "reduce regulation in order to . . . encourage the rapid deployment of new telecommunications technologies."[9] Congress therefore directed the Commission to "encourage

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6 *See* Jason Oxman, *The FCC and the Unregulation of the Internet*, Office of Plans and Policy, OPP Working Paper No. 31, Federal Communications Commission (July 1999), *available at* http:// ftp.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf.

7 47 U.S.C. § 230(a)(4).

8 *Id.* § 230(b)(2) (emphasis added).

9 Preamble to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans," using "regulatory forbearance" and "other regulating methods that remove barriers to infrastructure investment."[10] In order to facilitate the Commission's execution of these mandates, Congress defined the Internet broadly and inclusively.[11]

As IP platform services evolve and supplant legacy communications services throughout the industry, and as nontraditional providers of all types enter this market, the Commission should exercise its considerable discretion to maximize the potential of IP platform services by affirming conclusively that they are securely outside legacy economic regulation. Consistent with that goal, this petition asks the Commission to adopt a comprehensive federal solution as promptly as possible and to embrace an appropriately broad understanding of the services and networks subject to an express hands-off policy for the Internet.[12]

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[10] 47 U.S.C. § 157(a) notes.

[11] *See id.* § 231(e)(3) ("The term 'Internet' means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide network of computer networks that employ the Transmission Control Protocol/Internet Protocol or any successor protocol to transmit information."); *id.* § 230(f)(1) (defining the Internet as "the international computer network of both Federal and non-Federal interoperable packet switched data networks"); *id.* § 230(f)(2) (defining interactive computer service to include "any information service, system, or access software provider . . . including specifically a service or system that provides access to the Internet . . . .").

[12] The Commission is currently considering the application of its *existing* access charge rules to long distance voice *telecommunications services* that use IP as a transport technology. *See Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Docket No. WC-02-361 (filed Oct. 18, 2002). We urge the Commission to resolve that matter expeditiously. *See* Opposition of SBC Communications Inc., *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Docket No. WC 02-361 (Dec. 18, 2002); Reply Comments of SBC Communications Inc., *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Docket No. WC-02-361 (filed Jan. 24, 2003); Ex Parte Letter from James Smith, SBC, to Michael Powell, FCC, WC Docket No. 02-

1. *The Commission's Policy of Unregulation*

Congress's directives in the 1996 Act regarding the regulatory treatment of the Internet codify and build on well-established policies of the Commission. The Commission has consistently sought to ensure that the Internet will remain a regulation-free zone: In its own words, "[t]he Commission does not regulate internet services[.]"[13] As the Commission has said, "[w]e recognize the unique qualities of the Internet, and do not presume that legacy regulatory frameworks are appropriately applied to it."[14] The roots of this policy lie in the Commission's treatment of enhanced services in the *Computer Inquiries* over 20 years ago. Recognizing the enormous potential of enhanced services generally, the Commission resisted calls to regulate such services under Title II, concluding that subjecting them "to a common carrier scheme of regulation . . . would negate the dynamics of . . . this area."[15] In the Commission's view, "the absence of traditional public utility regulation of enhanced services offers the greatest potential for efficient utilization and full exploitation of the interstate telecommunications network."[16]

The Commission's foresight in establishing a practice of regulatory restraint from the outset has enabled the Internet to get well on its way to achieving its full potential: seamless

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361 (Jan. 14, 2004). The telecommunications services at issue in that proceeding are vastly different from IP platform services, as discussed below.

13 Notice of Proposed Rulemaking, *Local Competition and Broadband Reporting*, 14 FCC Rcd 18100, 18130 ¶ 61 (1999).

14 Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11540 ¶ 82 (1998) ("*Report to Congress*").

15 Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 431-32 ¶ 123 (1980) ("*Computer II*").

16 *Id.* ¶ 7.

convergence of voice, data, and video, with an array of constantly proliferating and evolving IP platform services. Once the hobby of a few thousand computer enthusiasts, the Internet now links upwards of 665 million users.[17] And hundreds if not thousands of entities now offer Internet access and related applications.[18]

The Internet is capable of not only mirroring — and combining — the capabilities of most traditional methods of electronic communication, but also offering users a wealth of new features and functionalities that were not possible before. Voicemail can appear as an MP3 file in a user's e-mail. Telephones can be plugged into or even replaced by computers. Americans can use their computers to watch soccer matches, in real time, from halfway across the globe. Increasing numbers of users rely on "Internet radio" as an eclectic alternative to traditional broadcast radio, with equivalent or superior sound quality. And business videoconferencing can include real-time interactive file-sharing features that greatly enhance productivity. These are just tips of the iceberg: Other innovative end-user services are introduced every day. And policies that increase availability of broadband will cause such services to proliferate even faster.

The Internet's resounding success story over the past decade is the ultimate validation of the Commission's policy of regulatory restraint. As the Commission has found, "[t]he Internet

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17 *Beyond the Bubble*, The Economist at 4 (Oct. 11, 2003). One study estimated that, as of July 2003, 62% of the population in the United States used the Internet, an increase of 86% since 2000. *See* http://www.internetworldstats.com. The same study estimated that there are currently almost 680 million Internet users worldwide. *See id.* Other researchers predict that the number of Internet users worldwide will approximate 945 million in 2004 and 1.46 billion in 2007. *See* eMarketer, March 2002, available at http://www.epaynews.com/statistics/ mcommstats.html#44 (last visited July 18, 2003).

18 For example, the website www.findanisp.com currently rates over 2,700 different Internet service providers ("ISPs"). In addition, the website http://www.ecommerce1.com lists 103 Internet software providers and 287 Internet hardware providers.

and other enhanced services have been able to grow rapidly in part *because* the Commission concluded that enhanced service providers were not common carriers within the meaning of the Act."[19] As noted above, Congress adopted and codified this conclusion in the 1996 Act, finding a direct connection between the absence of regulation and the Internet's continued growth, and declaring that it was "the policy of the United States" to stay the course first set by the Commission and preserve the Internet's unregulated status.[20]

2. *The Internet Today and Tomorrow*

An understanding of the Internet's evolution generally and the operation of IP platform services in particular is essential in order faithfully to implement the congressional directive to keep the Internet "unfettered by Federal or State regulation."[21] As discussed below, IP platform services function quite differently from those provided over traditional circuit-switched networks. These functional differences have allowed the Internet marketplace to become highly competitive, making regulation of the Internet both *unnecessary* and *harmful*.

a) *The Design, Operation, and Capabilities of IP-Based Networks Differ Significantly from Those of the Traditional Circuit-Switched Network and Demand Different Regulatory Treatment.*

IP-based networks are fundamentally different from the circuit-switched network. The traditional circuit-switched network — often referred to as the "public switched telephone network," or "PSTN" — was designed, as the latter designation indicates, for a single application: voice telephony. In fact, the very nature of circuit switching makes it inefficient for

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19 *Report to Congress* at 11546 ¶ 95 (emphasis added).

20 47 U.S.C. § 230(b)(2).

21 *Id.*

other applications. Because a circuit-switched network dedicates a fixed amount of capacity (the circuit) for the duration of the communication regardless of whether information is being transmitted, it is an inefficient medium for the transmission of data traffic. Moreover, the bandwidth of a circuit-switched transmission is typically quite narrow, which precludes its use for large quantities of information that must be sent simultaneously and continuously in real-time, such as video.

IP-based networks differ radically, because their underlying technology is fundamentally different from circuit switching. IP platforms are specifically designed to handle huge quantities of information at high speeds and to transmit myriad communications of all types. The IP platform utilizes packet switching, in which all information — including voice, data, and video — is broken down into individual packets, each representing a portion of the message sent.[22] Each packet is labeled to contain information that helps it arrive at its final destination — such as its originating and terminating endpoints and the number of packets that constitute the particular

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[22] As the FCC has described:

> The Internet is a distributed packet-switched network, which means that information is split up into small chunks or "packets" that are individually routed through the most efficient path to their destination. Even two packets from the same message may travel over different physical paths through the network. Packet switching also enables users to invoke multiple Internet services simultaneously, and to access information with no knowledge of the physical location of the server where that information resides.

Report to Congress at 11532 ¶ 64; *see also* Memorandum Opinion and Order, *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service is a Basic Service*, 10 FCC Rcd 13717, 13718 ¶ 3 (1995).

message.[23] The packets then travel over different routes to their ultimate destination, where they are reassembled.[24]

The emergence of the suite of protocols known collectively as IP has enabled providers to fully exploit these intrinsic benefits of packetization. Pursuant to widespread voluntary agreement, IP is the universal language of the Internet. This common, open code permits communications to travel seamlessly across national and, more importantly, technological borders. The use of IP has a dramatic impact on the nature and range of services the Internet can support, as compared to what is available over the circuit-switched network:

- *First*, the universality of IP permits unprecedented interconnectivity among otherwise dispersed networks. The Internet is the end product of this interconnectivity.

- *Second*, IP permits convergence of services that have traditionally been carried on different networks. Voice, data, and video can be unified by the language of IP, enabling them to be consolidated on a single network and transmitted simultaneously, with the packets commingled until they arrive at their respective destinations. Multiple applications can thus be offered concurrently and on a tightly integrated basis. The infinite possibilities of convergence stimulate innovation in the development and combination of additional services.

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[23] *See Report to Congress* at 11531 ¶ 62 n.124 ("IP defines the structure of data, or 'packets,' transmitted over the Internet.").

[24] The FCC has stated:

> "The path of least resistance" is the fundamental theory on which the Internet was built. Invented for the sole purpose of discovering a way to get important or large amounts of data from one location to another quickly, regardless of failures or delays in traditional communications networks, data packets over the Internet will take any path that does not resist transfer. The path of least resistance is not always the shortest path, but for data, it is the most reliable path for the mass transfer of data.

Fifth Annual Report, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 24284, 24320-21 ¶ 58 n.242 (1998).

- *Third*, packetization, together with the continually improving labeling functions of packet networks, permits calls to be transported more efficiently. The network can distribute the individual packets making up a particular message across different paths, and can route them dynamically in ways that avoid any problems in the network.

- *Finally*, the flexibility that is inherent in the IP platform gives end users unprecedented control over the services they receive. Customers can interact with stored data on a provider's network to customize their services to accommodate business, network, or other needs, integrating multiple applications as desired and according to their specific bandwidth and capacity requirements, in ways that are simply not possible over the circuit-switched network.

The rich variety of new service options available over IP platforms are possible precisely because of the characteristics that distinguish those platforms from the circuit-switched network. The IP platform is an overlay network, consisting of its own routers and IP-enabled facilities, that has been built separate and discrete from the circuit-switched network and traditional Asynchronous Transfer Mode ("ATM") and frame relay networks. In contrast to the circuit-switched network, the Internet is highly "modular," in that particular providers can and do specialize in supplying services on one layer without supplying services on another, and can compete effectively in doing so. The openness and modularity of the IP platform enable non-facilities-based providers of all types to offer services over the networks of others. As a result, the IP platform is itself dispersed and highly competitive, consisting of individual IP networks that operate independently of each other yet peer and interconnect with each other in individually tailored ways.

The technological differences between the traditional circuit-switched network and the IP platform bear directly on the manner in which these networks can and should be regulated. Because the circuit-switched network historically supported a single application — voice telephone calls — that service, and the network over which it was provided, were subjected to an essentially service-specific regulatory regime under Title II of the Act. This approach found

itself echoed in other service-specific regulatory "silos," such as Title III (and Title II) for wireless voice and data traffic, and Title VI for cable-based video service. But the technology underlying IP-based networks, and the ability of such networks to converge services, defy such segregation. As noted, IP networks integrate multiple services into a single bitstream, making it virtually impossible to know which packets relate to which application. As a result, the service and network categories on which traditional regulation was based cannot practically be applied in an IP world.

b) *The Internet is a Competitive Marketplace that Operates Without Regulatory Intervention Today.*

As a result of the Internet's open architecture and independence from traditional legacy networks, the Internet is characterized by low barriers to entry and an absence of market power that make regulation decidedly unnecessary. The nondiscriminatory quality of the Internet's open-standards architecture means that *any* entity can provide IP platform services simply by acquiring the necessary routers and links between them. As a result of the ease with which new participants can enter this marketplace, the Internet has evolved as a highly competitive, dispersed, and egalitarian "network of networks" — as its very name indicates.[25] These networks are operated by carriers and noncarriers alike, including governments, academic entities, and large and small private businesses.

Indeed, new and often "nontraditional" entities regularly enter the IP platform services market, setting up managed networks that serve their own or their customers' needs but which

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[25] Memorandum Opinion and Order, *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, 13 FCC Rcd 18025, 18105 ¶ 144 (1998) ("*WorldCom/MCI Merger Order*").

are interconnected with the "public" Internet. These entrants include equipment manufacturers, software companies, and other "noncarriers."[26] In this respect, the Internet stands in sharp contrast to the legacy circuit-switched and cable networks, each of which historically was owned by one provider that supplied most or all of the necessary facilities and services.

The modularity of IP-based networks and of the services and applications that ride on them enables competitors to enter the market at a variety of levels. Some providers focus their business plans on developing computer hardware or software, while others concentrate on the provision of discrete services such as backbone transport, Internet access, or specialized interactive content. The Commission itself has recognized that the market includes Internet access providers, application providers, content providers, and backbone providers, each of which specializes in a different aspect of Internet communications.[27] Many of these entities enter into partnerships in which each member provides one aspect of a service needed to meet a

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[26] For example, the Commission has noted that several mobile data providers "offer — either directly to individual consumers or to enterprise customers to implement for their employees — the ability to access on a mobile device company intranets and files stored on corporate servers," allowing customers to establish virtual private networks. Eighth Report, *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 18 FCC Rcd 14783, 14856 ¶ 167 (2003). Likewise, manufacturers of handheld devices such as Palm Pilots and Blackberrys have teamed up with Internet access providers to give their customers wireless Internet access. *See* Sixth Report, *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 16 FCC Rcd 13350, 13413-17 (2001).

[27] *See generally Report to Congress* at 11531 ¶ 62.

user's communications needs.[28] Often, these entities are customers of each other.[29] These attributes account for the very low concentration in the Internet marketplace. The Internet, and all the varied applications offered over it, show no signs of domination by the operators of the legacy wireline networks traditionally subject to Title II regulation; to the contrary, "[t]he Internet is a loose interconnection of networks belonging to many owners."[30] Indeed, incumbent telecommunications operators are at most secondary players in this market.

The cooperative arrangements through which multiple players provide IP platform services were established in the open market, *without* government regulation. For example, multiple Internet backbones are connected through either peering or transiting arrangements — private contractual arrangements by which Internet backbone providers exchange traffic.[31] As the Commission has recognized, these arrangements have proliferated notwithstanding that Internet backbone providers "compete with one another for ISP customers"; indeed, in order to remain competitive, "they must also cooperate with one another, by interconnecting, to offer their end users access to the full range of content and to other end users that are connected to the

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[28] For example, ServInt provides Internet access and backbone services, but it partners with various software and content providers in order to provide expanded Internet services to its customers. *See* http://www.servint.net/partners/network/index.html.

[29] For example, Aleron is a provider of Internet backbone services that counts many Internet service providers among its customers. *See* http://www.aleron.com/info/.

[30] *Report to Congress* at 11531 ¶ 62.

[31] *See* Michael Kende, *The Digital Handshake: Connecting Internet Backbones*, Office of Plans and Policy, OPP Working Paper No. 32, Federal Communications Commission at 4-8 (Sept. 2000); *WorldCom/MCI Merger Order* at 18105 ¶ 144. Peering arrangements and transiting arrangements differ in that, under the former, the providers do not charge each other for terminating traffic and will terminate only each other's traffic (and not that of a third-party provider). *See id.* at 18105-06 ¶¶ 145-46.

Internet."[32] As a result of these voluntary arrangements, the Commission concluded, "the Internet backbone is currently growing at an exponential rate."[33] Similarly, in discussing the regulation of cable modem service, the Commission noted that the many business relationships on which the Internet relies "are still evolving through negotiations and commercial decisions."[34]

c) *The Internet's Future Evolution Depends on Continued Unregulation of IP Platform Services.*

Regulation of IP platform services not only is unnecessary, but also would be affirmatively harmful to the continued development of the Internet as the communications mode of the future. The Commission has recognized that, as compared to regulation,

> [c]ompetitive markets are superior mechanisms for protecting consumers by ensuring that goods and services are provided to consumers in the most efficient manner possible and at prices that reflect the cost of production. Accordingly, where competition develops, it should be relied upon as much as possible to protect consumers and the public interest. In addition, using a market-based approach should minimize the potential that regulation will create and maintain distortions in the investment decisions of competitors as they enter local telecommunications markets.[35]

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32 *WorldCom/MCI Merger Order* at 18105 ¶ 144.

33 *Report to Congress* at 11533-34 ¶ 68.

34 Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798, 4818 ¶ 30 (2002) ("*Cable Modem Order*"), *rev'd on other grounds sub nom. Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

35 First Report and Order, *Access Charge Reform*, 12 FCC Rcd 15982, 16094 ¶ 263 (1997); *see also, e.g.*, Report and Order, *Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry)*, 95 F.C.C.2d 1276, 1301 ¶ 38 (1983) ("Regulation often can distort the workings of the market by imposing costs on market participants which they otherwise would not have to bear. . . . [T]he advent and growth of competition in a particular market eliminates the need for continued regulation.").

Government intervention is particularly undesirable in the Internet context, because the market is not only highly competitive but extremely dynamic. It was for this reason that the Commission refrained from regulating the Internet backbone; as the Commission observed, "The technology and market conditions relating to the Internet backbone are unusually fluid and fast-moving, and we are reluctant to impose any regulatory mandate that relies on the persistence of a particular market model or market structure in this area."[36] Regulation is incapable of keeping up with the rapid pace of transformative change that the Internet has brought to electronic communications generally.[37]

One manifestation of the dynamic nature of the Internet is the rapid and continuing erosion of any distinction between the public Internet and customer-specific, "managed" IP networks. Today, customers rely on managed networks to address the quality of service ("QoS") limitations that stem from what may be regarded as the "best effort" capabilities of the public Internet. To a large extent, the interconnected IP platforms making up the public Internet have operated without guarantees regarding how quickly or reliably information will reach its destination. As a result, today's public Internet often delivers traffic however it can without assurances of dedicated bandwidth, traffic prioritization, or differentiation between applications or between users that require particular service parameters. While these "best effort" capabilities

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[36] *Report to Congress* at 11535-36 ¶ 72. As discussed below, however, merely because a telecommunications service is transported over an Internet backbone for some distance does not mean that the service is exempt from certain obligations when it originates or terminates on a traditional telecommunications network.

[37] *See* "FCC Cable Chief Says 'Open' Internet is Primary Goal — Cites Agreement of Consumers and Industry," News Release (rel. 1999) ("To regulate [the Internet] at this juncture would be to say that the market has failed before the market has been given a chance.").

are perfectly suitable for certain types of Internet traffic — such as e-mail, file transfer, and other data applications that are not sensitive to packet loss or delay — these limitations are much more likely to impede higher-level applications: Voice and video traffic, for example, cannot tolerate the same degree of delay as data traffic. Managed networks have avoided this problem by allowing for the active management of traffic flows in a way that meets the particular requirements of different types of traffic and different end users.

But a variety of technologies for delivering QoS on the *shared* network are rapidly being introduced. QoS will allow IP platform services on the public Internet to become increasingly dynamic, user-specific, and customer-driven, thus eliminating relevant distinctions between managed and public networks.[38] And managed networks are increasingly linked to the public Internet. Developments such as these occur more quickly than regulators can anticipate, and any attempts to draw regulatory distinctions between, for example, "public" and "managed" IP networks would be obsolete before the ink was dry on the regulations.

In short, any attempt to impose regulation in this area would inevitably lag behind the newest developments and technological applications. That regulatory drag would discourage the

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[38] *See* Alice Mack, *Carrier-Class in an IP World, available at* http://www.iec.org/cgi-bin/acrobat.pl?filecode=226. There are various solutions under development. For example, Integrated services ("IntServ") uses explicit signaling whereby a given application requests a specific kind of service or resources it needs from the IP network before it sends the data. Under differentiated services ("DiffServ"), each packet is marked so as to determine the behavior that each hop in the path must support so that no packet has to wait. Packets assigned to a given class of service are provided the same treatment at each node or router over each hop such that the per-hop behavior is predetermined. With Multiprotocol Label Switching ("MPLS") (a draft networking standard that is not yet finalized), packets are assigned a "label," and special MPLS-compatible routers then assign the packets priority and routing based on the contents of the label. This allows network operators to guarantee the needed level of performance and route around network congestion.

innovation and new investment that are essential to the Internet's growth. As Commissioner Abernathy has cautioned:

> [I]t is important that we also act as technology facilitators — that is — we must recognize and reduce regulatory barriers to entry for emerging technologies through the adoption of policies that tap the benefits of emerging technologies. . . . [W]e should enact rules that allow free market forces to decide whether a particular technology succeeds or fails. In this manner, the market will dictate the success of technologies, not regulators.[39]

Similarly, as Chairman Powell remarked at the Commission's recent forum on voice-over Internet Protocol ("VoIP") telephony, "No regulator, either federal or state, should tread into this area without an absolutely compelling justification for doing so. Innovation and capital investment depend on this premise. The entrepreneurs seated before us depend upon this premise."[40] And Commissioner Copps noted at the VoIP forum that "[w]e are dramatically changing the way we communicate in this country, and around the globe, and we are challenged to adjust our policies and rules not only to accommodate, but to facilitate, this process of change."[41]

Maintaining the government's hands-off approach is critical to ensure the continued flow of money and new ideas into the Internet marketplace, and thus the success of this technology. Indeed, the Commission has repeatedly noted that it can "encourage investment and innovation

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[39] FCC Commissioner Kathleen Q. Abernathy, "The Importance of the Market," 3G Americas Board Briefing (June 3, 2003).

[40] "Opening Remarks of FCC Chairman Michael K. Powell at the FCC Forum on Voice over Internet Protocol (VoIP)," News Release (rel. Dec. 1, 2003) ("*Powell VoIP Forum Remarks*").

[41] "Opening Remarks of Commissioner Michael J. Copps, Voice over Internet Protocol Forum," News Release (rel. Dec. 1, 2003) ("*Copps VoIP Forum Remarks*").

by reducing regulatory obligations."[42] The Commission has recognized that broadband "should exist in an environment that eliminates regulations that deter investment and innovation and recognizes rules that promote competition and minimize harmful interference."[43] That approach requires firmly establishing that IP platform services will remain unregulated.

3. *The Threat to Unregulation*

The innovation and investment that are essential to the Internet's growth are currently being threatened. While the Commission's deregulatory approach to the Internet is widely acknowledged and its success universally recognized, this policy has come under siege in a variety of forums, including state commissions, state legislatures, courts throughout the United States, and even the Commission itself. As higher quality IP platform services emerge and begin substituting for legacy communications services, decisionmakers are increasingly being asked to shoehorn the former into regulatory models created for the latter. But those models were designed for an earlier era in which communications technologies and services tended to be vertically integrated rather than integrated across and between various platforms, and where there were real concerns about a single provider's market power because entry was neither open nor modular. As noted, IP platform services present no such concerns.

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[42] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 16999-17000 ¶ 22 (2003) ("*Triennial Review Order*") (quoting Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3705 (1999)).

[43] Notice of Proposed Rulemaking and Memorandum Opinion and Order, *Amendment of Parts 1, 21, 73, 74, and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, 18 FCC Rcd 6722, 6740-41 ¶ 34 (2003).

Regulatory issues relating to IP platform services are being raised in a patchwork of discrete, service-specific proceedings, in the courts and in the states, that can obscure and complicate larger issues about the appropriate regulatory treatment of the Internet. In one court decision that is likely to be challenged in other jurisdictions, for instance, a federal district court in Minnesota recently reversed an order of the Minnesota commission, and concluded that Vonage's VoIP is an "information service" under the Act and thus insulated from state telecommunications regulation.[44] Meanwhile, in *Brand X*, the Ninth Circuit upset one of the Commission's few definitive rulings involving IP platform services, rejecting the Commission's determination that cable modem services are "information services" exempt from Title II regulation.[45]

The *ad hoc* character of these court proceedings is mirrored at the state agency level. At least 18 states have begun taking positions on the regulatory classification and treatment of specific VoIP services or have been asked to do so. In recent months, public service commissions in Minnesota, Wisconsin, and California took steps to subject providers of such services to regulations applicable to traditional telephone companies.[46] Other states — including

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[44] *See Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 994 (D. Minn. 2003) (permanently enjoining the Minnesota Public Utilities Commission from regulating Vonage as a telecommunications carrier under state law). Issues relating to Internet-based services also will eventually be presented to federal courts in appeals from state public service commission determinations under section 252, as carriers seek to define how the unbundled network element ("UNE") and reciprocal compensation rules apply.

[45] *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

[46] *See* Order Finding Jurisdiction and Requiring Compliance, *Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp. Regarding Lack of Authority to Operate in Minnesota*, Docket No. P-6214/C-03-108 (Minn. Pub. Utils. Comm'n Sept. 2003); *California Joins VoIP Regulation Party*, Broadband Business Report (Oct. 7, 2003) (noting that

Alabama, Colorado, Illinois, Michigan, Missouri, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Virginia, and Washington — are investigating whether to take similar action, either on their own initiative or at the request of a specific party.[47] In addition to these activities by state public service commissions, at least two state legislatures — Florida and Pennsylvania — have passed or are considering passing laws concerning regulation of VoIP.[48]

Despite this activity in the courts and in the states, there can be little dispute that the Commission remains the appropriate leader in the area of Internet policy. Indeed, the disparate efforts described above should not be construed as a challenge to the Commission's authority over the Internet generally so much as they represent an attempt to fill in the gaps that have arisen as technology continues to evolve and generate yet more IP platform services. This frenzy of activity also serves as a call to action to the Commission. The Commission should not abdicate leadership to these dispersed forums, where decisionmakers lack the Commission's oversight of, and vision for, the industry as a whole.

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the California commission sent letters to six providers of VoIP requiring them to comply with state regulations governing telecommunications services); *Wisconsin Decides VoIP Getting Too Big to Ignore*, Broadband Business Report (Sept. 23, 2003) (noting that the Wisconsin commission, without a hearing, sent a letter to at least three providers of VoIP directing them to comply with state regulations applicable to telecommunications carriers).

47 *See* Alan Breznick, *States Weigh Regulating VoIP As Traditional Phone Service*, Cable Datacom News (Oct. 1, 2003); Peter Lewis, *Rules for Internet telephony challenge regulators; Is it telecommunications or information services?*, Seattle Times, at C1 (Oct. 13, 2003) (describing recent proceedings initiated in Washington state and Oregon); Margaret Boles, *Missouri PSC Considers Opening Proceeding on VoIP*, Telecommunications Reports Daily (Oct. 20, 2003); Gayle Kansagor, *VoIP Debate Moves to North Dakota*, Telecommunications Reports Daily (Dec. 8, 2003).

48 Fla. Stat. Chs. 364.01(3), 364.02(12) (2003); S. 900, Gen. Assem. 2003 Sess. (Pa. 2003).

Prompt action by the Commission is particularly needed because inaction or delay complicates later efforts to address the regulatory treatment of IP platform services as a unified whole. The *Brand X* decision is a cautionary case in point. The Ninth Circuit there vacated the Commission's statutory characterization of cable modem service because it felt compelled to follow its prior holding on a related issue in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000). The court explained that the Commission had ceded its institutional role on this issue when, at the time of the *Portland* litigation, it "ha[d] declined, both in its regulatory capacity and as amicus curiae, to address the issue before us."[49] It will be likewise insufficient for the Commission to make policy in this area on a purely reactive and piecemeal basis, assessing each new service or application in isolation as it is introduced — a tendency recently described by Chairman Powell as "regulating by accident."[50] The Commission will be pulled increasingly into that course, however, unless it acts now to address IP platform services as a whole.

The regulatory uncertainty that has grown as a result of the Commission's silence threatens to halt the Internet success story in its tracks. Providers of IP platform services have long understood themselves to be unregulated; indeed, as noted above, all sorts of noncarrier entities operate or are considering operating IP-based networks, and these entities have never anticipated suddenly becoming subject to common carrier economic regulations as a result. Yet the raft of disparate regulatory and judicial proceedings threatens to subject them to regulatory obligations that would not be easy to fulfill and that might radically affect their economics.

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[49] *Brand X*, 345 F.3d at 1131 (quoting *Portland*, 216 F.3d at 876).

[50] Brian Hammond, *Powell Wants Comprehensive Look at Internet Policy, Sees Need for Bigger Federal Role*, Telecommunication Reports Daily (Oct. 14, 2003) ("*Powell Internet Remarks*").